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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs Deceased, and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,

Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri,

Respondent.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

APPELLANTS' PETITIONS FOR REHEARING FROM THE ORDER OF THE COURT DISMISSING APPELLANTS' APPEAL AND FROM THE ORDER OF THE COURT DISMISSING THEIR PETITION FOR CERTIORARI

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BRIEF SUMMARY OF FACTS.

We believe it is impossible for this Court to intelligently understand and fully appreciate the merit in our

petition for rehearing without recalling to mind the essential facts which are the basis of our petition. The members of this busy Court could not possibly remember the basic facts of this case unless your recollection is refreshed. To save your time we respectfully submit this brief summary.

In June, 1930, Barker and Jacobs were legally employed by the Superintendent of the Insurance Department of the State of Missouri to institute proceedings against approximately 150 stock fire insurance companies for restitution of excess premiums collected by the companies in violation of a ten per cent rate reduction order of the Superintendent. Barker and Jacobs were employed under a written contract providing that if they were successful in recapturing all or any part of such funds they would be paid from such funds; if not successful they were to receive no pay. *Actuating Co. v. O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164, 1165-1166.

Barker and Jacobs faithfully performed all services required of them from 1930 to 1936, personally paid all expenses of the proceedings and succeeded in recapturing the sum of $2,751,000.00, and after all policyholders entitled to refunds who could be found were paid there remained a fund of $2,160,871.32 which was later paid and escheated in fact into the treasury of the State of Missouri.

The Circuit Court of Cole County, Missouri, allowed Barker and Jacobs a fee of $275,000.00 for their services and made it a lien upon the funds collected but upon appeal by the Superintendent, the Supreme Court of Missouri the Court held said attorneys had been legally employed, had rendered valuable services and were entitled to be paid but that they could not be paid out of the fund collected in accordance with Missouri law generally for the reason

this fund was a sacred trust fund for the sole benefit of policyholders and could not be used for any other purpose. *Aetna Ins. Co.* v. *O'Malley*, 343 Mo. 1232, 124 S.W.2d 1164.

Under general Missouri law when one performs services under an express contract which for some reason is void or unenforcible he may recover the value of his services on a quantum meruit as a benefit to the person receiving them. *Nibler* v. *Coltrane*, Mo. Sup., 275 S.W.2d 270, 273 (3).

In the case of *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, the Court said (l.c. 355):

> "The Insurance Code provides two methods of payment of expenses which are invoked by plaintiffs. Section 374.220 provides: 'The expenses of proceedings against insurance companies * * * shall be assessed by the superintendent upon the company proceeded against * * * and shall be in the first instance paid by such company, on the order of the superintendent directly to the person or persons rendering the service.' Sec. 374.260 provides that, if the expenses of the Division exceed the fees required to be collected, 'the superintendent shall, annually, assess upon all insurance companies doing business in this state a sum equal to such excess;' and that 'such assessments shall be made in proportion to the relative amounts of the assets of each company.' The intent of these provisions, of course, is that all expense of the operation of the Division of Insurance shall be paid by the companies so that it would cost the state nothing. See Sec. 374.160. Undoubtedly, it is intended that the Superintendent shall have discretion as to the use of these authorized methods, which plaintiffs apparently recognized by asking him to do one or the other. Of course, as suggested in Aetna Ins. Co. v. O'Malley, 343 Mo. 1232, 124 S.W.2d 1164, 1168, the Legislature could make an appropriation out of general

revenue to pay plaintiffs, without action by the Superintendent."

In 1936 said attorneys filed a claim in writing with the Superintendent of Insurance requesting that he audit, fix, allow and pay their claims. Said claims remained pending before the Superintendent and were renewed and amended from time to time with no action thereof by the Superintendent until February 7, 1958, when the Superintendent without notice or hearing overruled and dismissed said claims.

After it became apparent there would be a large residue left in the fund after all policyholders who could be found were paid and again even after the rights of all further policyholders in said fund had expired by reason of limitations said lawyers attempted unsuccessfully to enforce payment of their fees from said fund but the state escheated said fund into the State Treasury free from the claims of said lawyers. *Weatherby, Jacobs and Barker v. Jackson*, 358 Mo. 542, 215 S.W.2d 742; *Jacobs v. Leggett*, Mo. Sup., 295 S.W.2d 825.

The Missouri Supreme Court denied said lawyers had a right of recovery in quantum meruit in an action brought directly against the Superintendent. *Barker v. Leggett*, Mo. Sup., 295 S.W.2d 836. The Missouri Supreme Court there said (295 S.W.2d l.c. 840):

> "We believe it is the intent of the insurance code to vest the superintendent with primary jurisdiction to approve the usual expenses and to assess the expenses of proceedings against companies. We believe the right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, R.S. Mo. 1949, and more

particularly Sec. 536.100 dealing with judicial review of administrative decisions."

In the case of *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353, the Court again reiterated the above statement except that it shifted its position and designated Section 536.105 as the appropriate Administrative Procedure Review instead of Section 536.100 as formerly designated.

The Attorney General of Missouri as the Superintendent's legal adviser then advised the Superintendent to give these lawyers hearing on the merits. Thereafter the Superintendent contrary to said advice of the Attorney General, arbitrarily, without notice or any opportunity for said lawyers to present evidence or even be heard peremptorily denied and dismissed their claims.

Upon said lawyers attempting to pursue the Administrative review procedure from said ruling of the Superintendent as pointed out by the Supreme Court of Missouri, the Circuit Court dismissed such proceedings upon motion directed against the pleadings and without a hearing on the merits. Upon appeal from such rulings of the Circuit Court the Supreme Court of Missouri expressly overruled our Constitutional objections (359 S.W.2d, l.c. 800) and rendered the opinion and judgment herein complained of affirming the action of the Superintendent and Circuit Court denying said claimants any recovery on the ground that the Superintendent "cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance." 359 S.W.2d, l.c. 799. In other words the Supreme Court of Missouri construed the aforesaid statutes as holding that claimants' only remedy was through the Superintendent but that the Superintendent had an unbridled and uncontrolled discretion to refuse to hear their claims on the merits which was above and beyond any power of review and control by the Courts.

APPELLANTS' PETITION FOR REHEARING FROM THE ORDER DISMISSING THEIR APPEAL.

Come now appellants and petition the Court to set aside its order and judgment dismissing their appeal and upon reconsideration to note jurisdiction and set the cause down for oral argument, and for grounds of said petition appellants state:

1. The Court overlooked and inadvertently failed to consider the fact that the basis of the ruling of the Supreme Court of Missouri herein complained of was the fact that there was drawn in question the validity of statutes of Missouri on the grounds they were repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of their validity.

The Missouri Supreme Court held appellants' only primary and also final recourse was under the statute, Section 374.160, R.S. Mo., 1959, dependent upon the Superintendent of Insurance auditing, allowing and including appellants' claim in the executive budget followed by a legislative appropriation in accordance therewith (359 S.W.2d, l.c. 796, 798).

The Missouri Supreme Court held appellants' exclusive and only right of review of the order and ruling of the Superintendent of Insurance on appellants' claim was under Section 536.105, R.S. Mo., 1959, of the Missouri Administrative Procedure Act.

Appellants contended in the Missouri Supreme Court that the construction of those statutes denying them a hearing on the merits before a judicial forum and denying them

any right of recovery of compensation for services fully performed to the enrichment of the Missouri State Treasury in the sum of $2,160,871.32 under an admittedly valid contract rendered said statutes, as so construed, in violation of the Constitution of the United States (359 S.W.2d 797, 798, 799, 800). The Supreme Court of Missouri directly overruled those Constitutional objections saying, 359 S.W.2d, l.c. 800:

> "[3] When the superintendent assumed as true the facts upon which the claims were asserted and denied them, he, in effect, reviewed and ruled them on their merits, as required by § 536.105. Such review clearly constituted due process. State ex rel. Leggett v. Jensen, Mo., 318 S.W.2d 353, 357 [3, 4]. Moreover, such review was not violative of Article I, § § 13 and 14, of the Constitution of Missouri. Aetna Ins. Co. v. O'Malley, and Jacobs v. Leggett, both supra.
>
> "The decision herein reached makes it unnecessary to discuss the further contentions and questions raised.
>
> "The judgment of the trial court dismissing the applications for fees is affirmed."

(359 S.W.2d, l.c. 799:)

> "The refusal of the superintendent to recognize and allow said fees does not constitute deprivation of plaintiffs' liberty and property within the due process clauses of the Constitution of the United States and of the Constitution of the State of Missouri or the right of the freedom of contract in violation of the Fourteenth Amendment of the Constitution of the United States."

2. This Court overlooked and failed to consider the fact that this contract was entered into in June, 1930 (359 S.W.2d, l.c. 792): that at that time appellants had available to them the usual extraordinary remedies of the common law to compel action by the Superintendent of Insurance

and the usual liberal remedies of review by appeal from the action of the Superintendent.

In 1945, the Missouri legislature first passed the Administrative Procedure Act, of which Sec. 536.105, R.S. Mo., 1959, is a part, providing it should furnish the exclusive and only right of review of the acts of the Superintendent, and in the same year the 1945 Missouri Constitution was adopted establishing an executive budget providing that no appropriation not recommended in such budget should be acted upon until all recommendations in the budget were disposed of (Art. IV, Secs. 22 and 25, Mo. Const., 1945). This eliminated any reasonable opportunity to obtain a legislative appropriation without favorable action by the Superintendent.

The Missouri Supreme Court herein held that under the limited review permitted by Section 536.105, R.S. Mo. 1959, the Superintendent has absolute discretion, free from judicial control or review for abuse, to deny appellants' claims for compensation for services fully performed under a valid contract (359 S.W.2d, l.c. 799).

The subsequently enacted legislation as construed by the Missouri Supreme Court, which construction becomes a part thereof as if written in by the legislature (*Terminello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 895; *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 570, 69 S. Ct. 1291, 1296) entirely destroys appellants' contract not only interfering with appellants' Constitutional guaranty of the right to contract about their affairs but also impairing its obligation to the extent of completely destroying it.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 108, 65 S. Ct. 1464, 1469, 89 L. Ed. 2079, this Court declared a right without a remedy is not right at all.

3. This Court overlooked and failed to give proper consideration to the fact the ruling of the Missouri Supreme Court holds that the Superintendent has arbitrary discretion to refuse to pay legitimate obligations of the Department of Insurance, which can be paid in no other way, and the Courts are powerless to review for abuse of discretion or afford any kind of protection to any creditor of that department whom the Superintendent in his arbitrary discretion may elect not to pay. The ruling of the Court is as follows (359 S.W.2d, l.c. 799):

> "The superintendent of insurance, however, is merely an official of the executive branch of the state government, with powers limited to the functions prescribed by the statutes relating to the Division of Insurance. As such, he cannot be convicted of abuse of any discretionary power vested in him under those statutes in refusing to certify the fees here sought for payment by either defendant insurance companies, or any of them, or by assessing them as an expense of the Division of Insurance."

The opinion of the Supreme Court of Missouri holding the Superintendent of Insurance has an unfettered and uncontrolled discretion to pay or not pay the valid obligations of the Missouri Insurance Department is in direct and irreconcible conflict with the opinion of this Court in the case of *Angel* v. *Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, where this Court said (l.c. 660):

> "The Contract Clause, U.S. Const. Art. 1, § 10, the Full Faith and Credit Clause, U.S. Const. Art. 4, § 1, the Privileges or Immunities Clause, U.S. Const. Art. 4, § 2, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction 'the adjective law of the State', or the exercise of its right to regulate 'the practice and procedure' of its courts. Broderick v.

Rosner, 294 U.S. 629, 642, 55 S. Ct. 589, 592, 79 L. Ed. 1100, 100 A.L.R. 1133. A State 'cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent.' Kenney v. Supreme Lodge, 252 U.S. 411, 415, 40 S. Ct. 371, 372, 64 L. Ed. 638, 10 A.L.R. 716; and see White v. Hart, 13 Wall. 646, 20 L. Ed. 685. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 U.S. 22, 24, 44 S. Ct. 12, 14, 68 L. Ed. 143."

Here the State is attempting to escape the Constitutional obligations of one of its agencies by denying its Courts have jurisdiction to enforce the valid contracts of the Superintendent of Insurance. That is directly contrary to the decision of this Court in the above case and in violation of Appellants' Constitutional rights.

Such ruling clearly denies appellants access to any judicial tribunal and a judicial remedy for their valid contract fully performed and violates their rights to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.

Congress may not even delegate unfettered discretion to the President of the United States without violating the United States Constitution: *A. L. A. Schecter Poultry Corporation v. United States*, 295 U.S. 495, 537, 541-542, 55 S. Ct. 837, 846, 848.

4. The Court inadvertently overlooked and failed to consider the fact that although the statutes involved are fair on their faces the construction put on them by the

Missouri Supreme Court makes then unconstitutional and calls for relief at the hands of this Court. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220.

In the case of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 679-683, 50 S. Ct. 451, the Court said (l.c. 454):

> "[4-10] Second. If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. Ettor v. Tacoma, 228 U.S. 148, 33 S. Ct. 428, 57 L. Ed. 773. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (First National Bank of Greeley v. Weld County, 264 U.S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legaslative, executive, or administrative branch of government."

5. The Court overlooked and failed to understand and appreciate the hollow sham and pretense of the procedure held by the Supreme Court of Missouri to satisfy the requirements of due process and equal protection of the law under the guarantees of the United States Constitution. It is conceded appellants had a valid contract fully performed to the enrichment of the State of Missouri and were entitled to be paid but that the Superintendent of Insurance had an absolute discretion to pay or not to pay their claim and the Missouri Courts were powerless to review or control his action. The concept of due process enunciated by the Missouri Supreme Court is that merry-go-round trips through the Courts with no decision on the merits and always returning to the original point of departure finally ending in a decision that the Superin-

tendent has absolute discretion to pay or not to pay obligations of his department satisfies all requirements of due process under the Constitution of the United States.

The opinion of the Missouri Supreme Court herein is in direct conflict with the following decisions of this Court.

In the case of *Carter v. People of the State of Illinois*, 329 U.S. 173, 175, 67 S. Ct. 216, the Court said (l.c. 218):

> "The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity."

In the case of *Fay v. People of State of New York*, 332 U.S. 261, 288, 67 S. Ct. 1613, this Court said (l.c. 1628):

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial in which the hearing is a real one, not a sham or pretense. Palko v. State of Connecticut, 302 U.S. 319, 327, 58 S. Ct. 149, 153, 82 L. Ed. 288; Mooney v. Holohan, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406; Moore v. Dempsey, 261 U.S. 86, 43 S. Ct. 265, 67 L. Ed. 543."

In the case of *Baltimore & Ohio R. R. Co. v. United States*, 298 U.S. 349, 369, 56 S. Ct. 797, 807-808, 80 L. Ed. 1209, 1224, this Court said that Due Process "includes the right to introduce evidence and have judicial findings based upon it." Appellants have been denied that right.

In the case of *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681, 50 S. Ct. 455, the Court said (l.c. 454):

> "Whether acting through its judiciary or through its Legislature, a state may not deprive a person of

all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 475, 476, 38 S. Ct. 566, 62 L. Ed. 1215."

An adjudication of an issue implies that a party had a chance to win his case. The shameful record of this case shows clearly that appellants never had a chance to win their case. When they attempted to follow the exact procedures pointed out by the Supreme Court of Missouri as affording them a remedy that Court twice shifted positions finally concluding appellants are at the mercy of the uncontrollable discretion of the Superintendent and have no remedy or right to a judicial forum for the enforcement of their valid contract fully performed. *State ex rel. Leggett* v. *Jensen*, Mo. Sup., 318 S.W.2d 353; *State ex rel. Johnson, Admx.*, v. *Leggett*, Mo. Sup., 359 S.W.2d 790.

Surely this Court, busy as it is, cannot stand by and condone the one-sided, unfair and shifting procedures of the Missouri Courts in this case to stand on the public records as affording loyal and distinguished American citizens the due process of law contemplated by the Fourteenth Amendment.

WHEREFORE, appellants pray the Court to vacate and set aside its order and judgment dismissing appellants' appeal, note jurisdiction and set the cause down for argument on the docket at the early convenience of the Court.

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CERTIFICATE OF COUNSEL.

I hereby certify that the above Petition for Rehearing of the judgment and order of this Court dismissing appellants' appeal is presented in good faith and not for delay.

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Counsel for Appellants.

PETITION FOR REHEARING FROM THE ORDER DENYING CERTIORARI.

Come now Appellants and move the Court to vacate and set aside its order denying certiorari herein, note jurisdiction and set this case down for argument because of the following other substantial grounds not previously presented:

I. The Opinon and Judgment of the Missouri Supreme Court Denying Petitioners Any Right of Enforcement of Compensation Due Them under a Valid Contract for Services Admittedly Rendered from Which the State of Missouri Profited in the Sum of $2,160,871.32 Constitutes a Taking of Their Property Without Compensation in Violation of Their Rights under the Fourteenth Amendment to the Constitution of the United States.

Petitioners' contract rights to compensation for their services is a property right.

In the case of *Lynch* v. *United States*, 292 U.S. 571, 54 S. Ct. 840, it is said:

> "Valid contracts are property, whether the obligor is a private individual, a municipality, a state, or the United States."

In the case of *North Texas Producers Association* v. *Young*, 5 Cir., 308 F 2d 234, the Court said (l.c. 243):

> "A valid contract is property. Miller et als. v. Howe Sound Min. Co., (D.C.E.D. Wash.) 77 F. Supp. 540; Deutsche Bank, etc., v. Cummings, (C.C.A.D.C. 1936) 83 F.2d 554; Lynch v. United States, (1934) 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434. The last cited

cases, from courts of all levels conclusively hold that valid contracts are 'property'."

In the case of *Adrance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288, 53 S. Ct. 133, the Court said (l.c. 134):

> "[1] The question is whether the challenged enactment of 1919 may prohibit such waivers as contrary to public policy and void, and so limit the right of seller and purchaser to contract. While that right is a part of the liberty protected by the due process clause, it is subject to such restraints as the state in the exertion of its police power reasonably may put upon it. But freedom of contract is the general rule, and restraint the exception. The exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Adkins v. Children's Hospital, 261 U.S. 525, 545, 546, 43 S. Ct. 394, 67 L. Ed. 785, 24 A.L.R. 1238, and cases cited. In determining the validity of a legislative declaration that a contract is contrary to public policy, regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting, and that it is only where enforcement conflicts with dominant public interests that one who has had the benefit of performance by the other party to a contract will be permitted to avoid his own promise. Cf. Steele v. Drummond, 275 U.S. 199, 205, 48 S. Ct. 53, 72 L. Ed. 238; Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356, 51 S. Ct. 476, 75 L. Ed. 1112."

There is here and can be no dominant public interest against the Department of Insurance compensating its attorneys for fruitful services rendered under valid contracts. All rules of equity and morals are against such a position, and our opponents have never been bold enough to take that position.

Denying petitioners any remedy for enforcement of their compensation, admittedly fully earned under a valid

contract constitutes a "taking" of petitioners' property within the meaning of the Fourteenth Amendment.

In the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, the Court said (l.c. 160):

> "As was said in a Pennsylvania case, 'for practical purposes, the right to coal consists in the right to mine it'. Commonwealth v. Clearview Coal Co., 256 Pa. 328, 331, 100 Atl. 820, L.R.A. 1917E, 672. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for Constitutional purposes as appropriating or destroying it. This we think we are warranted in assuming the statute does.
>
> "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

What makes a contract to render legal services for the Department of Insurance valuable is the right to be paid for such services. Regulation to the extent of eliminating pay for such services, as here, clearly constitutes an appropriation of their earnings or a destruction of their property rights in said contract.

In the case of *United States v. General Motors Corp.*, 325 U.S. 373, 378, 65 S. Ct. 357, this Court said (l.c. 359):

> "[3] In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner, rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its

effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

To similar effect see *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 62, 55 S. Ct. 555, where it is said (l.c. 557):

"The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

When you take out the pay for services you take out all that is attractive or valuable.

In the case of *United States* v. *John J. Felin & Co.*, 334 U.S. 624, 630, 68 S. Ct. 1238, the Court said (l.c. 1241):

"In enforcing this constitutional requirement 'the question is, What has the owner lost? not, What has the taker gained?' Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195, 30 S. Ct. 459, 460, 54 L. Ed. 725; McGovern v. New York, 229 U.S. 363, 33 S. Ct. 876, 57 L. Ed. 1228, 46 L.R.A., N.S., 391. Respondent's sole claim is for the pecuniary equivalent of the property taken."

In the case of *Chicago, B. & Q. R. Co.* v. *City of Chicago*, 166 U.S. 226, 17 S.W. 581, 583, 584, the Court said:

"Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Bloom, in his work on Constitutional Law, says, 'is that of enjoying private property without undue interference or molestation.' Page 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law

for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' 2 Story, Const. § 1790; 1 Bl. Comm. 138, 139; Cooley, Const. Lim. *559; People v. Platt, 17 Johns. 195, 215; Bradshaw v. Rogers, 20 Johns. 103, 106; Petition of Mt. Washington Road Co., 4 N.H. 134, 142; Parham v. Justices of Inferior Court, 9 Ga. 341, 348; Ex parte Martin, 8 Eng. (Ark.) 199, 206, et seq.; Johnston v. Rankin, 70 N.C. 550, 555.

"But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law, as enjoined by the fourteenth amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the state to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

"It is not contended—as it could not be—that the constitution of Illinois deprives the railroad company of any right secured by the fourteenth amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial authorities,—and therefore whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'that state has clothed one of its agents with power to annul or evade it.' Ex parte Virginia, 100 U.S. 339, 346, 347; Neal v. Delaware, 103 U.S. 370; Yick Wo v. Hopkins, 118 U.S. 356, 6 Sup. Ct. 1064; Gibson v. Mississippi, 162 U.S. 579, 16 Sup. Ct. 904. These principles were enforced in the recent case of Scott v. McNeal, 154 U.S. 34, 14 Sup. Ct. 1108, in which it was held that the prohibitions of the fourteenth amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and consequently it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law, contrary to the fourteenth amendment.

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared

in court, and was permitted to make defense. It is true that this court has said that a trial in a court of justice according to the modes of proceeding applicable to such a case, secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice,—the court having jurisdiction of the subject-matter and of the parties, and the defendant having full opportunity to be heard,—met the requirement of due process of law. U.S. v. Cruikshank, 92 U.S. 542, 554; Leeper v. Texas, 139 U.S. 462, 468, 11 Sup. Ct. 577. But a state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form. This court, referring to the fourteenth amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application, where the invasion of private rights is effected under the forms of state legislation.' Davidson v. New Orleans, 96 U.S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the fourteenth amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state, within the meaning of that amendment."

II. The Opinion and Judgment of the Supreme Court of Missouri Herein Deprive Petitioners of Their Liberty of Contracting About Their Affairs and Being Able to Enforce Their Contracts in the Courts in Violation of Rights Guaranteed Them under the Fourteenth Amendment to the Constitution of the United States.

In the case of *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356, 51 S. Ct. 476, the Court said (l.c. 477):

> "[1-3] The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. Printing Company v. Sampson, L. R. 19 Eq. 462, 465; Baltimore & Ohio Southwestern Ry. v. Voigt, 176 U.S. 498, 505, 20 S. Ct. 385, 44 L. Ed. 560."

In the case of *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 43 S. Ct. 630, the Court, in holding the Kansas Industrial Court Act unconstitutional, said (l.c. 632):

> It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 43 Sup. Ct. 625, 67 L. Ed. , decided June 4, 1922. While there is no such thing as absolute freedom of contract, and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances."

In the case of *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042, it is stated:

"Without doubt, [liberty] denotes not only freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations in life. * * * and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

In the case of *Prudential Ins. Co. of America* v. *Cheek*, 259 U.S. 530, 42 S. Ct. 516, the Court stated the law as follows (l.c. 519):

"That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question. This court has affirmed that principle in recent cases."

In the case of *Nebbia* v. *People of State of New York*, 291 U.S. 502, 523, 54 S. Ct. 505, the Court said (l.c. 510):

"[2] Under our form of government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference. But neither property rights nor contract rights are absolute, for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm."

Certainly the enforcement of petitioners' contract for compensation for services rendered under a valid contract resulting in the State being enriched by the fruits of their labor in the sum of $2,160,871.32 will not react to the detriment of their fellows or work them harm.

The ruling of the Supreme Court of Missouri that petitioners are free to contract and their contracts are valid except that they cannot in the Court of Missouri enforce payment of their compensation fully earned under such valid contract strikes down or arbitrarily interferes with their freedom of contract in violation of rights guaranteed them under the Fourteenth Amendment to the Constitution of the United States.

In the case of *De La Rama S. S. Co.* v. *United States*, 344 U.S. 386, 390, 73 S. Ct. 381, the Court in describing a similar situation said (l.c. 383):

> "For the Government to acknowledge the liability but to deny the full extent of its enforceability recalls what was said in The Western Maid, 257 U.S. 419, 433, 42 S. Ct. 159, 161, 66 L. Ed. 299: 'Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp.'"

Petitioners have been arbitrarily, unreasonably and discriminatorily denied their right of freedom of contract for employment for compensation; their federally guaranteed rights have been invaded and the only place they can look is to this Court. We sincerely and earnestly hope and trust they will not look in vain. They rely upon the promise of this Court in the case of *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773 where this Court said (l.c. 777):

> "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

The opinion of the Supreme Court of Missouri holding the Superintendent of Insurance has an unfettered and uncontrolled discretion to pay or not pay the valid obligations of the Missouri Insurance Department is in direct and irreconcilable conflict with the opinion of this Court in the case of *Angel* v. *Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, where this Court said (l.c. 660):

> "The Contract Clause, U.S. Const. Art. 1, § 10, the Full Faith and Credit Clause, U.S. Const. Art. 4, § 1, the Privileges or Immunities Clause, U.S. Const. Art. 4, § 2, all fetter the freedom of a State to deny access to its courts howsoever much it may regard such withdrawal of jurisdiction 'the adjective law of the State', or the exercise of its right to regulate 'the practice and procedure' of its courts. Broderick v. Rosner, 294 U.S. 629, 642, 55 S. Ct. 589, 592, 79 L. Ed. 1100, 100 A.L.R. 1133. A State 'cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to Courts otherwise competent.' Kenney v. Supreme Lodge, 252 U.S. 411, 415, 40 S. Ct. 371, 372, 64 L. Ed. 638, 10 A.L.R. 716; and see White v. Hart, 13 Wall. 646, 20 L. Ed. 685. This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' Davis v. Wechsler, 263 U.S. 22, 24, 44 S. Ct. 13, 14, 68 L. Ed. 143."

Here the State is attempting to escape the Constitutional obligations of one of its agencies by denying its Courts have jurisdiction to enforce the contracts of the Superintendent of Insurance. That is directly contrary to the decision of this Court in the above case and in violation of Appellants' Constitutional rights.

In the case of *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, this Court said (l.c. 776):

> "[5] But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court's dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that 'the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs' legal rights have been ruthlessly violated.' [150 F.2d 98.]"

We submit that language is appropriate to the complaint here and calls loudly for relief at the hands of this Court.

WHEREFORE, appellants pray the Court to vacate and set aside its order and judgment denying appellants' petition for certiorari, note jurisdiction and set the cause down for argument on the docket at the early convenience of the Court.

Walter A. Raymond,

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Kansas City 6, Missouri,
Counsel for Appellants.

CERTIFICATE OF COUNSEL.

I hereby certify that the above Petition for Rehearing of the judgment and order of this Court denying Certiorari is presented in good faith and not for delay, and said Peti-

tion is restricted to other substantial grounds not previously presented.

Walter A. Raymond

WALTER A. RAYMOND,
915 Grand Avenue,
Kansas City 6, Missouri.

PROOF OF SERVICE.

I, Walter A. Raymond, counsel for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing Petitions for Rehearing from the Order Dismissing Appellants' Appeal and from the Order Denying Certiorari on all adverse parties as follows:

1. On the Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 13th day of February, 1963.

2. On the Aetna Insurance Company and other named Stock Fire Insurance Companies who were defendants in the Restitution Suit by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Honorable James M. Douglas, 705 Olive Street, St. Louis 1, Missouri, on the 13th day of February, 1963.

3. On the State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney

of record, Mr. Thomas E. Deacy, Sr., 2300 Bryant Building, Kansas City 6, Missouri, on the 13th day of February, 1963.

4. On the Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Mr. George A. Spencer, 517 Guitar Building, Columbia, Missouri, on the 13th day of February, 1963.

Walter A. Raymond

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Counsel for Appellants.